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No. 87-316

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

IRENE H. ALLEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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19 pp

QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' claims that the government (1) failed adequately to monitor radiation produced by the open-air atomic weapons tests conducted at its Nevada Test Site between 1951 and 1962 and (2) failed to provide offsite residents with sufficient notice of possible radiation hazards and how to reduce them.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 816 F.2d 1417. The opinion of the district court following the trial of the "bellwether" cases (Pet. App. B) is reported at 588 F. Supp. 247. The prior opinion of the district court on the motion to dismiss (Pet. App. C) is reported at 527 F. Supp. 476.

JURISDICTION

The judgment of the court of appeals (Pet. App. D 1-16) was entered on April 20, 1987. The petition for a writ of certiorari was filed on July 20, 1987 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are approximately 1,200 individuals, including both persons who lived downwind from the Nevada Test Site, the location at which the government

conducted over 100 open-air atomic weapons tests between 1951 and 1962, and the personal representatives of such individuals. They commenced actions against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, alleging that they had suffered personal injury and death as a result of radiation produced by the tests. Petitioners contend that the government's monitoring of offsite radiation was inadequate and that offsite residents were given insufficient information about radiation hazards and how to avoid them. Pet. App. A 3-4, B 2-3.

The district court consolidated petitioners' claims. It then denied the government's motion to dismiss on the ground that petitioners' claims were barred by the discretionary function exception to liability under the Federal Tort Claims Act, 28 U.S.C. 2680(a). The court stated that "[c]ertainly a number of the decisions and judgments that went into the conduct of the atomic tests represented the exercise of discretion at the highest levels of government. It is fundamental that for those decisions, the United States is immune from tort liability" (Pet. App. C 16-17). The court stated, however, that decisions made at lower levels of the government might not fall within the exception; it therefore denied the motion to dismiss "without prejudice to its later reassertion upon a more complete record" (*id.* at 18).

The court then tried 24 "bellwether" claims selected by the parties in order "to provide a selection of 'typical' cases which when decided and reviewed may provide a legal and factual pattern against which the remaining issues in the pending cases may be subsequently matched" (Pet. App. B 3). On 14 of those claims, the district court entered final judgment in favor of the government, finding that "the evidence is insufficient in each instance to demonstrate with the requisite weight that the defendant's negligence proximately caused the condition of which each com-

plains" (*id.* at 305; see also *id.* at 271-284). On nine claims, final judgment was entered in favor of petitioners (*id.* at 304-305; see also *id.* at 284-289, 291-294). And on one claim, the government was found liable (*id.* at 290-291) but a final judgment was not entered because damages had not been calculated (*id.* at 303, 304).

The district court's findings of liability were based upon its conclusion that the government was negligent in failing to measure offsite radiation "on a *person-specific* basis" and in failing to inform offsite residents of "known or foreseeable long-range biological consequences" of radiation exposure and of "well-known and inexpensive methods to prevent, minimize or mitigate" such risks. Pet. App. B 304 (emphasis in original); see generally *id.* at 155-234. The court concluded that the prevailing plaintiffs had suffered injuries that were proximately caused by that negligence (*id.* at 303).

The district court reaffirmed (Pet. App. B 101-122) its earlier conclusion that the discretionary function exception did not bar petitioners' claims. The court acknowledged that the decision to conduct the tests was a policy decision protected by the discretionary function exception. It found, however, that "[t]he manner in which [atomic weapons] tests were conducted * * * was not a matter of discretion because such operational conduct was subject to a standard" of due care (*id.* at 115-116).

2. The court of appeals reversed the judgments against the government, holding that the discretionary function exception barred liability under the Federal Tort Claims Act (Pet. App. A).[1] The court observed (Pet. App. A 3-4)

[1] The plaintiffs who did not prevail in the district court did not seek review of the judgments against them.

The court of appeals did not address the other grounds of the government's appeal: that no duty had been breached; that evidence that the government's actions had injured the prevailing plaintiffs was insufficient; and that the two-year FTCA statute of limitations, 28 U.S.C. 2401(b), barred the claims in this case. See Pet. App. A 3.

that, at the time of the events in question, the Atomic Energy Commission (AEC) was "authorized and directed to make arrangements * * * for * * * the protection of health during research and production activities" and that those arrangements were to "contain such provisions to protect health, to minimize danger from explosion and other hazards to life or property * * * as [the AEC] may determine." Atomic Energy Act of 1946, ch. 724, § 3(a), 60 Stat. 758-759; see also 42 U.S.C. 2012(d)-(e), 2013(d), 2051(d) (similar provisions in current law). The court stated that "[e]ach test explosion was executed according to detailed plans which the AEC officially reviewed and adopted. Separate plans for protecting the public, and for providing the public with appropriate information, were also adopted by the AEC" (Pet. App. A 4). The court noted that the AEC delegated authority to execute the plans to specific officers (*ibid.*).

Relying on *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), which this Court decided after the decision by the district court, the court of appeals first rejected petitioners' claim that "the AEC, in planning and conducting its monitoring and information programs, was not making the kind of policy judgments protected by" the discretionary function exception (Pet. App. A 7). The court observed that "[i]n the case before us, as in *Varig*, the government actors had a general statutory duty to promote safety; this duty was broad and discretionary" (*ibid.*). It said that it could not "say that what was protected by the Supreme Court in *Varig* is now subject to liability" (*ibid.*).

The court next rejected petitioners' argument that "even if the initial discretion granted the AEC by statute was broad, test site personnel violated the AEC's own policy directives by failing to implement adequate protective measures" (Pet. App. A 7). The court found that

"[n]either [petitioners] nor the district court have been able to point to a single instance in which test site personnel ignored or failed to implement specific procedures mandated by the AEC for monitoring and informing the public" (*ibid.*); the court of appeals instead found that "the district court's conclusions appear to be based, at least in part, on perceived inadequacies in the AEC's radiological safety and information plans themselves" (*ibid.* (footnote omitted)). Because the operational plans simply embodied "AEC policy decisions," they fell within the discretionary function exception (*id.* at 8). The court further concluded (*ibid.*) that

> [g]overnment liability cannot logically be predicated on the failure of test-site personnel to go beyond what the operational plans specifically required them to do. If, as the plaintiffs maintain, the AEC delegated 'unfettered authority' to a Test Manager and his subordinates to implement public safety programs, this simply compels the conclusion that those officers exercised considerable discretion. Their actions, accordingly, also fall within the discretionary function exception.

The court of appeals noted that the present case differed from *Varig Airlines* because *Varig Airlines* "involved the actions of a regulatory agency supervising private individuals"; it recognized, however, that "*Varig* expressly reaffirmed the earlier Supreme Court decision of *Dalehite* v. *United States,* 346 U.S. 15 (1953), which found very broad governmental immunity outside a regulatory setting" (Pet. App. A 9). In *Dalehite,* the court observed, the Supreme Court found that the discretionary function exception barred the imposition of liability upon the government for claims arising out of the storage of fertilizer. "Given the Court's holding in *Dalehite,* reaffirmed in *Varig,* we must conclude that the government is immune from liability for the failure of the AEC administrators

and employees to monitor radioactivity more extensively or to warn the public more fully than they did" (Pet. App. A 11 (footnote omitted)).

The court of appeals concluded that "no evidence was presented of any act or omission of the AEC or its employees that clearly contravened a specific statutory or regulatory duty, or that exceeded statutory or regulatory authority. * * * [Petitioners'] entire case rests on the fact that the government *could* have made better plans. This is probably correct, but it is insufficient for FTCA liability" (Pet. App. A 12 (emphasis in original)). Because the AEC's decisions rested upon balancing "public safety against what was felt to be a national necessity, in light of national and international security," the court concluded, "it is not the place of the judicial branch to now question them" (*id.* at 13).

Judge McKay filed a concurring opinion. He observed that petitioners had failed to provide a single example "of a failure to monitor or distribute information *as prescribed in the [AEC's] plans*" (Pet. App. A 4 (footnote omitted; emphasis in original)). He stated that petitioners' claim instead "goes toward the failure of the plans to specifically prescribe greater monitoring or more diffuse and in-depth information distribution" (*id.* at 5). Judge McKay squarely rejected the claim that alleged defects in the AEC's plans could give rise to liability under the Federal Tort Claims Act: "the broad safety language of the Atomic Energy Acts had to be translated into concrete plans, and that translation involved the very essence of social, economic, and political decision making—the precise policy choices protected by the discretionary function exception" (*ibid.*).

ARGUMENT

1. This case is controlled by this Court's decision in *Dalehite* v. *United States,* 346 U.S. 15 (1953). In *Dalehite,*

the Court applied the discretionary function exception to a fertilizer procurement and shipping program undertaken by the government in an effort to increase food production in occupied territories following the Second World War. As the court below noted, the plaintiffs in *Dalehite* argued, "just as the present [petitioners] argue here," that the government had failed both to incorporate sufficient safety precautions in the design of its program and to investigate sufficiently and warn against the attendant hazards (Pet. App. A 10). But the Court concluded in *Dalehite* (346 U.S. at 35-36) that the discretionary function exception "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." Thus, the Court held that the exception not only barred claims that the government was negligent in adopting the program as a whole but also claims that the government was negligent in various phases of manufacturing, packaging, labeling and shipping the product and in failing to warn those handling the fertilizer of its dangerous nature. 346 U.S. at 38-44.

The decision to test the atomic bomb was a policy decision. The Atomic Energy Commission, which was given broad discretion in carrying out that policy (see Pet. App. A 3-4), devised detailed plans governing all aspects of the program, including "plans for protecting the public, and for providing the public with appropriate information" (*id.* at 4). These plans, which embodied "AEC policy decisions" (*id.* at 8), as well as the actions of the Test Manager, who had "some day-to-day discretion" in implementing those plans (*id.* at 4), come within the discretionary function exception as delineated in *Dalehite*. As the Ninth Circuit has also concluded—in a case distinguishable from this one only in that the claims there arose out of atomic

weapons tests conducted in the South Pacific rather than at the Nevada Test Site—"*Dalehite* is squarely on point." *In re Consolidated United States Atmospheric Testing Litigation,* 820 F.2d 982 (1987).

The decision below also receives substantial support from this Court's decision in *Varig Airlines* (467 U.S. at 814), and especially from its observation that Congress fashioned the discretionary function exception "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." That caution is nowhere more appropriate than here. "The bomb-testing decisions made by the President, the AEC, and all those to whom they were authorized to delegate authority in the 1950s and 1960s, were among the most significant and controversial choices made during that period" (Pet. App. A 13). The claims in this case are barred because they challenge those decisions, which "expressly balanced public safety against what was felt to be a national necessity, in light of national and international security" (*ibid.*).[2]

2. Petitioners assert (Pet. 14) that there is a conflict among the circuits concerning the scope of the discre-

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[2] The distinction petitioners wish to draw (Pet. 15-22) between regulatory functions—which are within the exception—and nonregulatory or proprietary functions—which are not—was expressly rejected in *Varig*. The Court in *Varig* reaffirmed *Dalehite,* which applied the exception outside a regulatory context, and quoted legislative history clearly stating that " 'administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like' " fall within the exception. 467 U.S. at 809-810, 811-813 (citations omitted). "[T]he basic inquiry concerning the application of the discretionary function exception," the Court stressed, is simply whether the challenged acts involve "legislative and administrative decisions grounded in social, economic, and political policy" (*id.* at 813-814). The instant case plainly involves "the execution of a Federal project" that implicates the most profound concerns of "social * * * and political policy."

tionary function exception. In fact, there are two areas of disharmony among the courts of appeals in construction of the discretionary function exception. This case, however, involves a straightforward application of the exception and poses no conflict with any decision of this Court or any other court of appeals.

a. Some court of appeals decisions see a material distinction between "policy" and "planning" activities, on the one hand, and "operational" activities, on the other. These decisions stress that negligent implementation of discretionary policies and plans is not itself discretionary and therefore not within the scope of the exception. See, *e.g., U.S. Fire Ins. Co.* v. *United States,* 806 F.2d 1529 (11th Cir. 1986) (negligent placement and maintenance of buoys by Coast Guard); *Aslakson* v. *United States,* 790 F.2d 688 (8th Cir. 1986) (failure of power administration to elevate power lines over lake); *Henderson* v. *United States,* 784 F.2d 942 (9th Cir. 1986) (negligently exposed high voltage wires); *Alabama Electric Coop. Inc.* v. *United States,* 769 F.2d 1523 (11th Cir. 1985) (negligent design of dike by Army Corps of Engineers); *Drake Towing Co.* v. *Meisner Marine Construction Co.,* 765 F.2d 1060 (11th Cir. 1985) (misplacement of buoys by Coast Guard); *Eklof Marine Corp.* v. *United States,* 762 F.2d 200 (2d Cir. 1985) (mismarking of channel by Coast Guard); *SCNO Barge Lines, Inc.* v. *Sun Transp. Co.,* 775 F.2d 221 (8th Cir. 1985) (misleading information in Coast Guard navigation reports).

Other court of appeals decisions, by contrast, emphasize that operational decisions may nonetheless be discretionary, and where they are—particularly where an agency concerned with resource allocation decides to do so much, and not more, in addressing a general problem or providing a product or service—such decisions should not be second-guessed in a tort suit. See, *e.g., Bowman* v. *United States,* 820 F.2d 1393 (4th Cir. 1987) (failure to

erect guardrail, place warning signs or close Blue Ridge Parkway during inclement weather); *C.P. Chemical Co.* v. *United States*, 810 F.2d 34 (2d Cir. 1987) (decision of Consumer Product Safety Comm'n to ban insulation manufactured by plaintiff under Consumer Product Safety Act rather than using procedures of Federal Hazardous Substances Act); *Myslakowski* v. *United States*, 806 F.2d 94 (6th Cir. 1986) (sale of used jeeps without warning of propensity to overturn in certain situations); *Pierce* v. *United States*, 804 F.2d 101 (8th Cir. 1986) (challenge to review process that led to allegedly wrongful termination of disability benefits); *Heller* v. *United States*, 803 F.2d 1558 (11th Cir. 1986) (FAA's allegedly wrongful denial of medical certificate to pilot); *Smith* v. *Johns-Manville Corp.*, 795 F.2d 301 (3d Cir. 1986) (sale of surplus asbestos "as is" without warnings or warranties); *Brown* v. *United States*, 790 F.2d 199 (1st Cir. 1986) (issuance of weather forecast based on incomplete information due to failure to repair or replace sporadically malfunctioning weather-reporting buoy), cert. denied, No. 86-528 (Jan. 20, 1987); *Mitchell* v. *United States*, 787 F. 2d 466 (9th Cir. 1986) (decision not to mark power lines below 500 feet); *Lindsey* v. *United States*, 778 F.2d 1143 (5th Cir. 1985) (consideration given to patent application); *Ford* v. *American Motors Corp.*, 770 F.2d 465 (5th Cir. 1985) (sale of used jeeps without warning of propensity to overturn in certain situations); *Spencer* v. *New Orleans Levee Bd.*, 737 F.2d 435 (5th Cir. 1984) (inaccurate weather forecast).

There is no clear circuit conflict posed by the cases in these two categories. Indeed, all circuits with decisions in the first category also have cases in the second category. While we would be prepared to argue that some of the above-cited cases were wrongly decided,[3] we do not believe

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[3] In particular, *Eklof*, *SCNO Barge*, *Drake Towing*, and *U.S. Fire Ins.* all seem to turn the Coast Guard into an insurer of safe navigation.

that they pose the sort of stark contrast of legal principle that weighs heavily in favor of granting certiorari. The cases in this area are highly fact-specific, and differences may be more of emphasis than of legal principle.

More immediately, this case does not present an opportunity to clarify the tension among these court of appeals decisions. Petitioners are here attacking the plans developed by AEC, not any negligent implementation of those plans. "Neither [petitioners] nor the district court have been able to point to a single instance in which test site personnel ignored or failed to implement specific procedures mandated by the AEC for monitoring and informing the public" (Pet. App. A 7). Rather, "[petitioners'] entire case rests on the fact that the government *could* have made better plans" (*id.* at 12). The two other courts of appeals that have considered similar attempts to second-guess an entire government program have both agreed with the court of appeals here and with this Court's decision in *Dalehite* that the discretionary function exception bars any such suit. See *In re Consolidated United States Atmospheric Testing Litigation, supra; In re Agent Orange Product Liability Litigation*, 818 F.2d 194 and 818 F.2d 210 (2d Cir. 1987).

b. There has also been a long-simmering conflict, now in full boil, over the extent to which the negligent execution of a safety-related regulatory program is subject to suit under the FTCA. In *Varig Airlines,* the Court held that the FAA's program of spot-checking compliance with safety standards, with the primary burden placed on the manufacturer to ensure compliance, "falls squarely within the discretionary function exception" (467 U.S. at 820). "The FAA," the Court noted, "has a statutory duty to *promote* safety in air transportation, not to insure it" (*id.* at 821 (emphasis in original)). Two Circuits, however, in cases decided after *Varig Airlines,* have nonetheless imposed liability on the government for negligence in con-

ducting safety compliance checks. See *Collins* v. *United States*, 783 F.2d 1225 (5th Cir. 1986) (decision by Mine Safety and Health Administration to rescind an "Imminent Danger Order" and not to reclassify mine as "gassy" after inspection revealed high methane levels); *McMichael* v. *United States*, 751 F.2d 303 (8th Cir. 1985) (failure of Defense Department inspectors to enforce safety requirements on defense contractor). Both courts distinguished *Varig Airlines* because the inspectors in question had no discretion not "to enforce detected violations of the safety requirements" (*McMichael*, 751 F.2d at 307; see *Collins*, 783 F.2d at 1230-1231).

Most courts, by contrast (including a different panel of the Eighth Circuit), have heeded this Court's injunction not to turn agency efforts to enhance safety into government insurance of regulated industries. See, *e.g*, *Barnson* v. *United States*, 816 F.2d 549 (10th Cir. 1987) (alleged failure of U.S. Public Health Service and AEC to warn uranium miners of, and protect them against, radiation hazards); *Bacon* v. *United States*, 810 F.2d 827 (8th Cir. 1987) (alleged failure of HUD and EPA to warn of dioxin levels during repair of roads at Times Beach under federal block grant); *Merklin* v. *United States*, 788 F.2d 172 (3d Cir. 1986) (AEC inspectors' alleged failure to warn uranium processing plant employees of health hazards discovered during AEC inspections); *Cunningham* v. *United States*, 786 F.2d 1445 (9th Cir. 1986) (alleged failure of OSHA to exercise reasonable care in conducting plant inspections); *Begay* v. *United States*, 768 F.2d 1059 (9th Cir. 1985) (alleged failure by federal agencies to warn of dangers of uranium mining); *Cisco* v. *United States*, 768 F.2d 788 (7th Cir. 1985) (EPA's alleged failure to warn that dirt contaminated with dioxin had been used in residential land fill); *Baxley* v. *United States*, 767 F.2d 1095 (4th Cir. 1985) (FAA's allegedly negligent decision not to regulate or inspect ultralite aircraft); *Shuman* v. *United States*, 765 F.2d 283 (1st Cir. 1985) (alleged

negligence by Navy in not controlling use and handling of asbestos by contractor); *Russell* v. *United States*, 763 F.2d 786 (10th Cir. 1985) (alleged negligence by MSHA in inspecting coal mine); *Hylin* v. *United States*, 755 F.2d 551 (7th Cir. 1985) (mine inspectors' alleged failure fully to inspect clay mine); *Feyers* v. *United States*, 749 F.2d 1222 (6th Cir. 1984) (Army's allegedly negligent failure to inspect contractor's operation of government-owned railyard), cert. denied, 471 U.S. 1125 (1985); *General Public Utilities Corp.* v. *United States*, 745 F.2d 239 (3d Cir. 1984) (NRC's alleged failure to warn of possible equipment defects at Three Mile Island nuclear facility), cert. denied, 469 U.S. 1228 (1985); *Natural Gas Pipeline Co.* v. *United States*, 742 F.2d 502 (9th Cir. 1984) (alleged negligence in FAA inspection and issuance of certificates for aircraft).

We believe that a conflict meriting this Court's attention exists on the question of whether an agency's alleged failure to follow its own regulations in regulating the safety of a given industry can give rise to liability under the FTCA. While we will shortly be urging that the Court grant certiorari in a case raising this issue,[4] the instant case does not present this issue. There is no evidence that any AEC safety regulations were violated in the conduct of the atomic tests in question here. As the court of appeals carefully noted, "no evidence was presented of any act or

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[4] Two recent decisions reached opposite results concerning the government's alleged failure to follow its own regulations in licensing a strand of polio vaccine. *Berkovitz* v. *United States*, 822 F.2d 1322 (4th Cir. 1987) (discretionary function exception bars suit), petition for cert. pending, No. 87-498 (filed Sept. 25, 1987); *Baker* v. *United States*, 817 F.2d 560 (9th Cir. 1987) (discretionary function exception does not apply). In light of this direct conflict, the United States has decided to acquiesece in the petition for certiorari filed in *Berkovitz* and to file a petition for certiorari in *Baker*.

omission of the AEC or its employees that clearly contravened a specific statutory or regulatory duty, or that exceeded statutory or regulatory authority." Pet. App. A 12. And as Judge McKay stressed in his concurrence, petitioners have failed to provide a single example "of a failure to monitor or distribute information *as prescribed in the [AEC's] plans*" (*id.* at 4 (footnote omitted; emphasis in original)). This case involves nothing more than a straightforward application of *Dulehite*, as to which no conflict exists.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1987

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